CBS Corporation f/k/a Westinghouse Corporation, Science & Technology Center, CBS Corporation f/k/a Westinghouse Electric Corporation, Energy Systems, Nuclear Services Division and International Union, United Plant Guard Workers of America, and its Local 502. Cases 6-CA-27184 and 6-CA-27261

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On August 12, 1996, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in opposition to the Respondents' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.³

This case involves the subcontracting of unit work in two of the Respondents' units. The General Counsel contends, and the judge found, that the Respondents' subcontracting actions violate Section 8(a)(5) because the two relevant collective-bargaining agreements preclude subcontracting during their terms without union approval. In support of that position, the judge relied on a zipper clause in each of these contracts which, he found, privileged the Union's refusal to discuss subcontracting during the terms of the agreements.⁴

The Respondents' witnesses have described the zipper clauses in this case as containing language that is standard in those collective-bargaining agreements to which the Respondents have previously been parties. The Respondents contend that the zipper clauses do not privilege the Union's refusals to negotiate.

We agree with the judge. Although the zipper-clause language here at issue may be standard for the Respondents' contracts, it is not the kind of zipper clause that was at issue in the cases relied on by the Respondents. In this regard, we note particularly that the clauses in this case operate with respect to matters that were "discussed" during the negotiation of the contracts, and in none of these other cases did a contract clause serve to "zip up" bargaining over "discussed" matters.

In negotiations for the Science and Technology Center (STC) contract, this discussion consisted of statements by the Respondent STC's chief negotiator, at the onset of negotiations, that the Company had considered but rejected the possibility of outsourcing unit work. After the Union had been given this assurance, the Union did not pursue further the issue of subcontracting. A concern about subcontracting was also raised in the Nuclear Services Division (NSD) unit, and Respondent NSD gave assurances that guards would not be laid off there.

In these circumstances under the terms of the zipper clauses, the issue of subcontracting was not subject to required bargaining during the life of each of the contracts. Thus, the Union could use the clause as a shield

provided, the Company and the Union, for the life of the Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subject or matters not specifically referred to or covered by this Agreement which were discussed during the negotiation of this Agreement.

The judge distinguished this case from a number of cases cited by the Respondents, including Milwaukee Spring Division, 268 NLRB 601 (1984), affd. sub nom. Auto Workers v. NLRB, 765 F.2d 175 (D.C. Cir. 1985), on the ground that those cases did not involve collective-bargaining agreements containing zipper clauses. Contrary to the judge, the collective-bargaining agreement in Milwaukee Spring Division. did contain a zipper clause. See 765 F.2d at 177 fn. 4. However, as the court's affirmance of the Board's Order noted, the union "did not rely on the zipper clause to oppose the relocation decision" in that case. Id. at 183. Here, the Union did invoke the zipper clause, and the Union and the General Counsel have argued that this clause, in the circumstances, operated to prohibit the Respondents from subcontracting guard work and laying off unit employees permanently during the lives of the contracts. We therefore find the Respondents' reliance on Milwaukee Spring Division to be inapposite.

⁵ See, e.g., Miami Systems Corp., 320 NLRB 71 (1995); Chicago Tribune Co., 318 NLRB 920 (1995); Mead Corp., 318 NLRB 201 (1995); Ohio Power Co., 317 NLRB 135 (1995); Bonnell/Tredegar Industries., 313 NLRB 789 (1994), enfd. 46 F.3d 339 (4th Cir. 1995); Public Service Corp., 312 NLRB 459, 461 fn. 6 (1993); Outboard Marine Corp., 307 NLRB 1333, 1338 (1992); Michigan Bell Telephone Co., 306 NLRB 281 (1992) (zipper clause held to be ambiguous by the Board, rejecting contention that it foreclosed bargaining over subjects not mentioned in "demands and proposals" made during negotiations); Gannett Rochester Newspapers, 305 NLRB 906 (1991).

 $^{^{\}rm l}$ We have granted the General Counsel's unopposed motion to amend the caption.

² The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no merit in the Respondents' allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondents in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the Respondents' witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

³ We leave to compliance the determination whether employee Mike Garofalo should be covered by the make-whole remedy in view of the Respondents' contention that he had resigned before the unit work was unlawfully subcontracted.

⁴ The zipper clause in the NSD contract reads as follows, and the STC contract differs only in that the italicized language (which is not italicized in the original) is not contained in the latter:

This Agreement expresses the complete understanding of the parties in respect to all matters deemed by them to be applicable to the specified bargaining unit. Therefore, except as herein specifically

to resist efforts by the Respondents to re-raise the matter of subcontracting, and the Respondents could not use the clauses as a sword to change the status-quo as to this subject. See *GTE Automatic Electric*, 261 NLRB 1491, 1492 fn. 3 (1982). In these circumstances, we find that Respondent STC violated the Act by failing to obtain the Union's consent before subcontracting unit work and permanently laying off unit employees. Similarly, NSD guards, who were covered by a zipper clause similar to the one contained in the STC contract, were also unlawfully laid off after their work was subcontracted during the term of that agreement.⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, CBS Corporation f/k/a Westinghouse Electric Corporation, Science & Technology Center, CBS Corporation f/k/a Westinghouse Electric Corporation, Energy Systems, Nuclear Services, Division, Pittsburgh, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN GOULD, concurring.

I write separately to express my disagreement with Board precedent which concludes that an employer cannot alter terms and conditions of employment unilaterally without obtaining a clear and unequivocal waiver from the union. More specifically, I find fault with the Board's application of the clear and unmistakable waiver standard in recent years.¹ I am of the view that this line

Similarly, the waiver analysis focused solely on the language of the zipper clause of the collective-bargaining agreement in *Mead Corp*. In that case, the contract did not contain a retirement incentive program and the Respondent implemented such a plan after failing to secure the Union's agreement to it. The zipper clause "excluded all matters from further negotiation for the duration of this Agreement" The Board found that the zipper clause unambiguously precluded the Respondent

of authority does not promote stability and maturity in relationships between labor and management which enhance both industrial peace and mutual respect which is rooted in rights and obligations for both sides. Moreover, my view is that the current law of the Board promotes forum shopping because of the fact that dramatically different results will be available from courts and arbitrators as opposed to those which can be obtained before the Board.

Arbitrators and courts² resolve controversies of this kind on the basis of the provisions of the collective-bargaining agreement and the contractual obligations to which both parties have agreed to adhere. In such proceedings the arbitrator, the judiciary or the judge will look to bargaining history, past practice, and contract language to make such a determination. In these cases the burden is upon the union or the employer, depending upon the party claiming a contractual violation, to establish that a violation of the contract exists through a preponderance of the evidence in the proceeding.

For the Board it is all the other way around. The bar is raised so that the respondent must show that there has been a clear and unequivocal waiver of a right that otherwise exists. The Board's determination of whether there has been a waiver under this standard often is confined solely to an examination of the language of a management-rights or zipper clause.³

I am in accord with the view of the Court of Appeals for the Sixth, as well as Seventh Circuit, and the District of Columbia that this approach is flawed because waiver is inappropriate where the parties have in fact bargained and reflected their intent in either contractual language or in some form of understanding. For the Board's current position distorts the bargain that has been made by the parties and places a new standard in its

from implementing any new terms not contained in the agreement in the absence of the Union's assent.

I have previously expressed serious reservations about the Board's use of this standard. See my dissenting opinion in *Beverly California Corp. (Beverly II)*, 326 NLRB No. 29, slip op. at 15 fn. 6 (1998).

² Controversies concerning whether a party has contractually waived the right to bargain come before the courts when there is no arbitration clause in the parties' agreement. Otherwise, such controversies are decided through arbitration. See *Auto Workers v. Webster Electric Co.*, 299 F.2d 195 (7th Cir. 1962).

³ See, e.g., *Michigan Bell Telephone Co.*, supra, and *Mead Corp.*, supra

⁴ Gratiot Community Hospital v. NLRB, 51 F.3d 1255 (6th Cir. 1995).

⁵ Chicago Tribune v. NLRB, 974 F.2d 933 (7th Cir. 1992).

⁶ NLRB v. Postal Service, 8 F.3d 832 (D.C. Cir. 1993). See also Dept. of Navy v. Federal Labor Relations Off., 962 F.2d 48 (D.C. Cir. 1992).

⁶ Member Hurtgen does not pass on the issue of whether a "waiver" analysis is to be applied in the instant case. In his view, that analysis and a "contract coverage" analysis yield the same result. (With respect to the "contract coverage" analysis, see, e.g., *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993).) In this regard, he notes that the instant zipper clauses explicitly cover matters that had been "discussed" in negotiations, and that the matter of subcontracting had been discussed in negotiations. That discussion included assurances that there would be no subcontracting or layoffs during the life of the contract. In these circumstances, the Respondents were not free to unilaterally subcontract and lay off employees during the life of the contract. For the above-stated reasons, Member Hurtgen finds it unnecessary to pass on the wide-ranging views expressed by Chairman Gould in his concurrence.

¹ See, e.g., *Michigan Bell Telephone Co.*, 306 NLRB 281 (1992), and *Mead Corp.*, 318 NLRB 201 (1995). In *Michigan Bell Telephone Co.* the determination of whether the zipper clause in the contract waived the right to bargain over the implementation of a substance abuse policy rested solely on the language of the zipper clause. Finding that the clause was subject to more than one interpretation, the Board found that the clause was ambiguous and therefore could not constitute a clear and unmistakable waiver of bargaining rights.

By focusing solely on the contract language, the Board reduced the clear and unmistakable waiver standard from a broad standard which takes into account the bargaining history, the full context of the bargaining relationship and the experience of labor relations to a narrow standard which is confined to the parsing of phrases. This approach too often may be subject to the charge that it is arbitrary or merely result oriented

place which has nothing or little to do with what was collectively bargained and, therefore, impedes the collective-bargaining process which Congress has urged us to promote through the enactment of Sections 8(a)(5), 8(b)(3), and Section 8(d).

But my view is that the opinions of the courts which reject the Board's precedent are equally flawed. For they proceed upon an oversimplified "contract coverage approach" which is predicated upon what is, in the words of the Court of Appeals for the Sixth Circuit "memorialized" in writing. This so-called "contract coverage approach" proceeds oblivious to the Supreme Court's proclamation that collective-bargaining agreements are based upon past practices and customs and understandings as well as written language. As the Court said in *United Steelworkers v. Warrior & Gulf Navigation Co.*:

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of collective bargaining although not expressed in it.⁸

Thus, the difficulty with these recent rulings is that (1) they seem to assume that the contract "is only the written language set forth by the parties" and (2) they frequently gainsay the difficulties in determining contract obligations, written or unwritten, and delve into the difficult area of contract interpretation which the Court and the Board through its *Collyer* doctrine have properly remitted to the jurisdiction of arbitrators.

The Supreme Court, since the *Steelworkers Trilogy*¹¹ has made clear that contractual obligations as a matter of Federal labor policy under Section 301 are to be found in not only language of the agreement but in promises and agreements, both explicit and implicit, sometimes owing their origin to plant practices and customs in the relationships between the parties which are not reduced to writing. The Court there ordered arbitration on the basis of contractual obligations contained in collective-bargaining

agreements and the view that such matters were more suitable to the expertise of arbitrators as opposed to the judiciary.

It is possible that, for instance, the union may have protested or grieved the contracting out of work beyond the bargaining unit and "fully discussed and consciously explored"¹² the matter without reducing its resolution to contract terms to specific language, whether it is in the collective-bargaining agreement or not. Surely, however, this issue has been bargained and if the discussion of issues fails to take the parties away from past practice which has favored management, an arbitrator would not find a contractual obligation, and it would seem that the Board should not find a failure of the duty to bargain in good faith under Section 8(a)(5) notwithstanding the absence of a clear and unmistakable waiver as those words appear to be currently understood. On the other hand, where there is no past practice or where the parties are in an embryonic relationship, the mere fact that there has been discussion without resolution does not favor defense to an unfair labor practice charge attacking unilateral undertaking by management.

The key here must be consideration of a wide variety of factors that are normally relevant to the question of contractual intent. The opinion articulated by Chairman Paul Herzog almost a half a century ago in *Jacobs Mfg.*¹³ appears to be the best starting point for a policy of the Board¹⁴ which promotes the resolution of disputes, discourages forum shopping, and is in the interest of implementing the public policy in favor of promoting reliance by the parties upon their own resources rather than the those of the taxpayers.¹⁵ That case involved the in-

⁷ Gratiot Community Hospital, supra.

⁸ United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 at 582 (1960).

Chicago Tribune, supra, and Gratiot Community Hospital, supra.
 192 NLRB 837 (1971).

¹¹ United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., supra; United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). See Aaron, On First Looking into the Lincoln Mills Decision, 12 Ann. Meeting, Nat'l Acad. of Arb. (BNA) 1 (1959); Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mtn. L. Rev. 247 (1958); Cox, Current Problems in the Law of Grievance Arbitration, 73 Harv. L. Rev. 1482 (1959); Gould, The Supreme Court and Labor Arbitration, 12 Lab. L. J. 330 (1961); Kramer, In the Wake of Lincoln Mills, 9 Lab. L. J. 835 (1958); Meltzer, The Supreme Court, Arbitrability and Collective Bargaining, 28 U. Chi. L. Rev. 464 (1961); Shulman, Reason, Contract and Law in Labor Relations, 68 Harv. L. Rev. 999 (1955); Summers, Judicial Review of Labor Arbitration, 2 Buffalo L. Rev. 1 (1952).

¹² Rockwell International Corp., 260 NLRB 1346 (1982).

¹³ 94 NLRB 1214 (1951); 196 F.2d 680 (2d Cir. 1952).

¹⁴ Cf. Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389 (1950).

⁵ In other contexts, I have favored policies which diminish reliance upon the taxpayer. See, for instance, my dissent in Flint Iceland Arena, 325 NLRB 318 (1998), where I also urge the diminishment of potentially wasteful litigation within the context of non-Board settlements. Illustrative of a decision which substantially diminished litigation through its broad and clear mechanical rule relating to jurisdiction was Management Training, 317 NLRB 1355 (1995). The doctrine in Management Training has been approved in Teledyne Economic Development v. NLRB, 108 F.3d 56 (4th Cir. 1997), and in Pikeville United Methodist Hosp. v. NLRB, 109 F.3d 1146 (6th Cir. 1997), where we asserted jurisdiction over private employers. In my separate opinion in Legal Aid Society of Alameda County, 324 NLRB 796 (1997), I stated that I would overrule the Board's decision in Detroit College of Business, 296 NLRB 318 (1989), because its multifactor test for determining whether professionals possess supervisory status which would exclude them from statutory coverage is confusing and improperly focused on the work of the professional rather than the work of the employee being supervised, and thus inconsistent with the Board's efforts to diminish wasteful and unnecessary litigation. Consistent with this view, I have also advocated that the promotion of voluntary recognition agreements in order to avoid unnecessary litigation. See Smith's Food & Drug Centers, 320 NLRB 844, 847-848 (1996) (Gould, W., concurring). The Board has concurred with this approach in its promotion of settlement agreements negotiated where a decertification petition has been filed and an incumbent union has an established relation-

terpretation of the portion of Section 8(d) which provides that the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

In the earlier cases of Allied Mills¹⁶ and Tide Water Associated Oil Co.,¹⁷ the Board concluded that the relevant portion of Section 8(d) refers only to terms and conditions which have been reduced to writing in the contract. The written language error, so favored by the circuit courts in the decisions alluded to above and contrary to the policy set forth in the Steelworkers Trilogy, appears to find its roots in these decisions which influenced the plurality in Jacobs. Chairman Herzog would not have applied the Tide Water decision in such a way as to find that discussion and resolution of a matter in negotiations could not come within Section 8(d) when the resolution had not been reduced to writing. He noted that in Jacobs, the parties discussed group insurance in negotiations and reached an agreement on it outside the written agreement.

It is instructive in this regard to recall Chairman Herzog's reasoning for finding that group insurance should not be subject to bargaining:

[I]t is only reasonable to assume that rejection of the Union's basic proposal, coupled in this particular instance with enhancement of the substantive benefits, constituted a part of the contemporaneous "bargain" which the parties made when they negotiated the entire 1948 contract. In the face of this record as to what the parties discussed and did, I believe that it would be an abuse of this Board's mandate to throw the weight of Government sanction behind the Union's attempt to disturb, in midterm, a bargain sealed when the original agreement was reached.

To hold otherwise would encourage a labor organization—or, in a §8(b)(3) case, an employer—to come back, time without number, during the term of a contract, to demand resumed discussion of issues which, although perhaps not always incorporated in the written agreement, the other party had every good reason to believe were put at rest for a definite period. I do not think that the doctrine of the *Tide Water* case was ever intended to go so far as to ex-

ship with the employer. *Douglas-Randall, Inc.*, 320 NLRB 431 (1995). This policy is the wellspring for the Board's rule giving the Board's administrative law judges authority to act as settlement judges. Under this rule, a judge "other than the trial judge" may be assigned to a case "to conduct settlement negotiations," provided all parties agree. Where "feasible," settlement conferences are held in person, and settlement judges may delve more deeply into all aspects of a case than the judge who will ultimately hear and decide the case absent settlement.

tend to facts like these, or that it should be so extended. Without regard to the niceties of construing the words of §8(d) of the amended Act, I am satisfied that it would be both inequitable and unwise to impose a statutory obligation to bargain in situations of this sort. That would serve only to stimulate uncertainty and evasion of commitments at a time when stability should be the order of the day.

But, while the concurring opinion of Chairman Herzog in Jacobs makes good sense as a matter of logic and policy as a general proposition, it has limits with regard to unilateral changes. As noted earlier, Jacobs was a case involving the determination of whether midterm bargaining was required under Section 8(d). Different considerations arise when unilateral action is taken under the rationale that there has been a waiver of bargaining rights. It is quite possible in many instances that an unwritten bargain reflects resolution of the case which should not be disturbed by the Board. The Board should not intervene—and should encourage the parties to resort to arbitration through such mechanisms as the Collyer doctrine—whether the agreement is in writing or not, though where the agreement is nonarbitrable it seems appropriate to preclude bargaining only where there is a specific intent not to provide for bargaining. 18 But the point here is that a wide variety of agreements do not provide answers to the question of whether or not the parties have intended to allow employers or unions, for that matter, to control decisions unilaterally. That is why employers frequently negotiate management-rights and prerogatives and zipper clauses.

I am of the view that the Board's opinion in *Beacon Piece Dyeing & Finishing Co.*¹⁹ makes this point well. And I find compelling the Board's reasoning that application of the Herzog approach to unilateral changes might:

encourage employers to firmly resists inclusion in contracts of as many subjects as possible, with a view to such resistance giving them a right of unilateral action thereafter on all subject excluded from the contract, thereby impeding the collective-bargaining process and creating an atmosphere which inevitably would lead to more strikes . . . it would discourage unions from presenting *any* subjects in negotiations, for a simple refusal by the employer to agree to the demand on the subject would leave the union in the unhappy dilemma of either giving up the demand and thereby losing its bargaining rights on the subject, or striking in support of the demand—this too would seriously impede the collective-bargaining process and lead to more strikes. Id. at 960.

¹⁶ 82 NLRB 854 (1949).

¹⁷ 85 NLRB 1096 (1949).

¹⁸ Cf. Gould, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of A T & T and Misco*, 64 Notre Dame L. Rev. 464 (1989).

^{19 121} NLRB 953 (1958).

If there is an answer to this difficult issue, I am of the view that it is not to be found in the development of a new standard, but in a return to a more reasonable application of the original clear and unmistakable wavier standard applied by the Board, and approved by the Supreme Court in C & C Plywood Co.²⁰ an application which includes the concerns expressed by Chairman Herzog in Jacobs.

The complaint in C & C Plywood, alleged that the Respondent violated Section 8(a)(5) by unilaterally implementing a premium pay schedule for a classification of employees. The Respondent argued that the Union had waived its statutory right to bargain over the matter by agreeing to a wage clause in its collective-bargaining agreement with the Respondent which gave the Respondent the right to unilaterally implement such a pay schedule. The Board found no waiver under the clear and unmistakable standard.

The Board described the standard as requiring an examination of precontract negotiations as well the contract language:

The Board's rule, applicable to negotiations during the contract term with respect to a subject which has been discussed in precontract negotiations but which has not been specifically covered in the resulting contract, is that the employer violates Section 8(a)(5) if, during the contract term, he refuses to bargain or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and that the Union "consciously yielded" or clearly and unmistakably waived its interest in the matter.21

Applying this standard, the Board found that although a premium pay schedule for a classification of employees had been mentioned in contract negotiations, this alone was not sufficient to indicate that the matter had been fully discussed or consciously explored. Further, the wage contract agreed to by the parties made reference only to individual premium pay. The Board found that this negated any conclusion that the Union consciously yielded bargaining rights concerning group premium pay. Finally, the Board construed the wage clause to give the Respondent the right to pay a premium rate to reward a particular employee for special competence or skill, and not to authorize the Respondent to select a group of employees and unilaterally change the method of compensating them.

In construing the contract, the Board stated: To accept Respondent's construction is tantamount to saving that the Union inferentially surrendered to Respondent the right unilaterally to establish production standards and wage rates based thereon as a method for compensating employees. Such intent is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact. We see nothing in these negotiations or this contract to establish that the Union intended to waive its statutory right to bargain over the matter in dispute.²²

Thus, the Board not only looked to the precontract negotiations and the contract language, but also to its understanding of the labor relations experience to determine whether there had been a clear and unmistakable waiver.

The Supreme Court explicitly approved the Board's approach to the waiver issue in C & C Plywood:

[T]he Board relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach. For the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context.²³

Nothing in the 31 years of decisions following C & CPlywood sheds any doubt on the Supreme Court's approval of the Board's clear and unmistakable waiver standard.²⁴ Indeed, the Court applied the standard in Metropolitan Edison Co. v. NLRB, 25 to find that the Union did not waive the statutory right for its officials to be protected against the imposition of more severe sanctions for participating in an unlawful work stoppage. In discussing the standard for determining whether the Union waived the statutory right, the Court stated: "[T]he waiver must be clear and unmistakable."²⁶ In applying the standard, the Court examined prior arbitration decisions concerning the issue and found no pattern was established which would indicate that the decisions had been incorporated into the agreement or that the Union's silence in negotiations manifested a waiver. ²⁷

²⁰ 148 NLRB 414 (1964), and NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).

21 Id. at 416, quoting *Proctor Mfg. Corp.*, 131 NLRB 1166, 1169

^{(1961).}

²² Id at 417

 $^{^{23}}$ C & C Plywood, Corp. , supra, 385 U.S. at 430.

²⁴ The Federal courts, like the Board, are bound to follow the Supreme Court's rulings. See, for example, my concurring opinion in Leslie Homes, Inc., 316 NLRB 123, 131 (1995). Given the Court's definitive approval of the clear and unmistakable waiver standard in C & C Plywood, it would appear that the freedom to develop a different standard such as the "contract coverage" theory espoused by the D.C. Circuit and the Sixth and Seventh Circuit Courts of Appeal simply does not exist.

^{25 460} U.S. 693 (1983).

²⁶ Id. at 708.

²⁷ Metropolitan Edison involves employees' statutory right to be free from discrimination in a strike situation rather than the statutory right to bargain which was at issue in C & C Plywood. While Metropolitan

In my view, the Board's articulation and application of the clear and unmistakable waiver standard in C & C *Plywood*, as approved by the Supreme Court in its C & C Plywood and Metropolitan Edison decisions, is the proper analysis for determining whether a union has waived statutory rights. By taking into account the contract language, the bargaining history, the full context of the bargaining relationship, and the Board's experience with labor relations, the clear and unmistakable waiver standard accords with the national labor policies discussed earlier. Thus, the standard incorporates the teaching of the Steelworkers trilogy that a collectivebargaining agreement rests not only on the language of the written agreement, but also on the full context of labor relations between the parties and the underlying regulatory scheme. It is consistent with the *Collyer* policy of deferral because it respects the deal that was struck between the parties. At the same time, the standard promotes stability in collective bargaining by ensuring that unilateral changes can be made only if it is clearly established that the parties agreed to waive bargaining on such changes.

The Board's decisions in Radioear Corp. 28 provide insight into the proper application of the standard. In Radioear, the complaint alleged that the Respondent violated Section 8(a)(5) by unilaterally terminating a "turkey money" bonus paid to employees at Thanksgiving and Christmas for 13 years prior to the Respondent's first contract with the Union. During negotiations for the contract, the Union proposed a clause preserving all existing benefits. The Respondent rejected the proposal. The contract ultimately reached by the parties did not mention the bonuses. The contract also contained a zipper clause stating that the Union had the opportunity to make proposals with respect to all proper subjects of bargaining during negotiations and that the Respondent. therefore, was not obligated to bargain with respect to any matter not covered in the agreement. The Respondent contended that the zipper clause relieved it of the obligation to bargain over the turkey money.

In *Radioear I*, the administrative law judge found that the zipper clause did not constitute a clear and unmistakable waiver of the union's statutory right to bargain. He noted that no mention was made of the holiday bonuses during negotiations and thus there could not have been any conscious intention to waiver bargaining rights concerning them. The majority of the Board found that the standard applied by the judge was "a rigid rule, formulated without regard for the bargaining postures, propos-

Edison can be distinguished factually from C & C Plywood on this ground, there is nothing in the Metropolitan Edison decision to suggest the contractual waiver of the statutory right to be free from discrimination is different from the contractual waiver of any other statutory right.

als, and agreements of the parties."²⁹ The Board majority called for a modification of the clear and unmistakable wavier standard which would take into consideration such factors as:

(a) the precise wording of, and emphasis placed upon, any zipper clause agreed upon; (b) other proposals advanced and accepted or rejected during bargaining: (c) the completeness of the bargaining agreement as an "integration"—hence the applicability or inapplicability of the parol evidence rule; and (d) practices by the same parties, or other parties, under other collective-bargaining agreements.³⁰

Because the collective-bargaining agreement and the context of its execution were at the heart of the dispute, the Board deferred decision to the parties contractual settlement procedures under the doctrine of *Collyer Insulated Wire*.³¹

In *Radioear II*, the Board was presented with an arbitration decision concerning the turkey money bonuses where the arbitrator specifically was unwilling to determine whether there was a waiver of statutory rights. The majority of the Board dismissed the complaint. Member Kennedy dismissed because he found that the arbitrator's award denying the grievance was not repugnant to the Act. Chairman Miller and Member Penello applied the clear and unmistakable waiver standard that had been set forth by the Board majority in *Radioear I*.

Chairman Miller and Member Penello found that the Union waived its right to bargain over the turkey money. They relied on the Union's attempt, during negotiations, to secure a clause preserving all existing benefits and its agreement, after failing to secure the clause, to a clause specifically relieving the Respondent of the obligation to bargain over any subject or matter not specifically referred to in the agreement. They concluded that in light of the language of the contract and the circumstances surrounding the bargaining, the Union consciously and knowingly waived any bargaining obligation as to non-specified benefits such as the turkey money.

This, in my view, is the proper application of the clear and unmistakable waiver standard. The judge in *Radioear I* applied the standard in such a way that a waiver could have been found only if the parties specifically addressed turkey money in their negotiations or in their contract language. Anything less would not have been a conscious exploration of the matter. Yet, surely this is a rigid and unrealistic view of collective bargaining. Too often, in the years succeeding *Radioear I* and *II*, the Board has followed the approach of the judge in that case, and not the Board. The *Radioear II* approach takes a much less rigid approach by examining the proposals made, rejected, and accepted and interpreting these ac-

²⁸ 199 NLRB 1161 (1972) (*Radioear I*), and 214 NLRB 362 (1974) (*Radioear II*).

²⁹ Radioear I, 199 NLRB at 1161.

³⁰ Id

³¹ 192 NLRB 837 (1971).

tions and writings in light of the Board's expertise in labor relations. ³² I urge a return to that application of the clear and unmistakable waiver standard more similar to what it was as it was understood to be more than two decades ago.

Of course, the best practice for the Board to follow in cases involving allegations of a contractual waiver of statutory rights is to promote the policy of deferral to arbitration expressed in *Collyer*³³ and to remit such matters to arbitration wherever possible. The promotion of arbitral jurisdiction and expertise is always the preferred way to handle such cases.

The problem of management-rights clauses and their bearing upon the controversy highlights this aspect of the issue. Management may argue that a management-rights clause clearly gives it the right to act. One difficulty here is that it is often not easy to determine whether management's contention is correct, particularly when it is juxtaposed against the other contractual provisions of a general nature, i.e., seniority and recognition clauses which a union contends argues for a different conclusion. Again, it would be wise for the Board to defer to arbitration under Collyer. But where this is not possible the inquiry ought to focus, as it did in the C & C Plywood and Radioear decisions, upon the intentions of the parties, past practice, bargaining history, contract language, and agreements in and outside of the written collectivebargaining agreement, to determine whether a contractual violation exists.

Here, deferral under *Collyer* is not at issue, and thus the clear and unmistakable waiver standard must be applied. The General Counsel alleges that the Respondents' contracting out of unit work is unlawful because the relevant collective-bargaining agreements preclude such action during their terms without the Union's consent. The administrative law judge found assurances with regard to outsourcing and downsizing during the negotiations placed the subject within the restrictions of the zipper clause of section XIX—Modification, the zipper clause in the contracts.³⁴ I agree with the judge's conclusion.

This Agreement expresses the complete understanding of the parties in respect to all matters deemed by them to be applicable to the specified bargaining unit. Therefore, except as herein specifically provided, the Company and the Union for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subjects or matters which were discussed during the negotiation of this agreement.

During negotiations, the Respondents' chief negotiators told the Union that the Respondents had considered and rejected the possibility of outsourcing unit work. After receiving this assurance, the Union did not pursue further the issue of outsourcing during the negotiations. As noted above, the zipper clauses ultimately agreed upon by the parties relieved the parties of bargaining obligations with respect to any subjects or matters which were discussed during the negotiation of the agreements. Taking into account the discussion of outsourcing during the negotiations and the specific language of the zipper clauses, I find that the zipper clause is a clear and unmistakable waiver of the right to bargain over outsourcing under the standard that I find to be appropriate.

The Board gives proper effect to industrial peace and collective-bargaining stability by adhering to the parties' agreement. Here, the Union used the zipper clause as a shield to resist efforts by the Respondent to change the status-quo as to contracting out unit work.³⁵ This it could properly do because the bargain so provides.

Don Burns, Esq. and Stephanie E. Brown, Esq., for the General Counsel.

Louis J. Carr Jr., Esq., James A. Buddie, Esq., and Robert A. Edwards, Esq., of Pittsburgh, Pennsylvania, for the Respondents.

Mark L. Heinen, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on April 23 and 24, 1996. International Union, United Plant Guard Workers of America, and its Local 502 (UPGWA or the Union) filed a charge on April 6, 1995, ¹ in Case 6–CA–27184 against Westinghouse Electric Corporation, Science and Technology Center (Respondent, Company, or STC). The Union filed a charge in Case 6–CA–27261 against Westinghouse Electric Corporation, Energy Systems, Nuclear Services Division (Respondent, Company or NSD) on May 3. Complaint in Case 6–CA–27184 issued February 23, 1996, and complaint in Case 27261 issued February 27, 1996. The two cases were consolidated by Order issued February 27, 1996.²

³² See also *KIRO*, *Inc.*, 317 NLRB 1325 (1995), where the Board examined precontract negotiations and past practice in determining that a management-rights clause did not constitute a waiver of the Union's right to bargain about the effects of the decision to produce the 10 p.m. news

³³ Collyer Insulated Wire, 192 NLRB 837 (1971).

³⁴ Sec. XIX—MODIFICATION reads:

³⁵ Compare *GTE Automatic Electric, Inc.*, 261 NLRB 1491 (1982). There the employer invoked a zipper clause as a shield against bargaining and union demands for new benefits during the contractual midterm. The employer did not act unilaterally with respect to unit employees and in fact maintained the status quo. That is not the case here, where the employer disturbed the status quo by acting unilaterally to contract out unit work.

¹ All dates in the months of August, September, October, November, and December are in 1994 unless otherwise indicated. All dates in January, Feburary, March, April, and May are in 1995, unless otherwise indicated

² The Respondents have filed a motion to dismiss in these proceedings, which is hereby overruled and denied. Insofar as it is necessary to comment on this ruling, I find that the charges filed in the respective cases support the complaints issued in the involved cases. They allege a violation of the Act, inter alia, by the Respondents' repudiation of the collective-bargaining agreements, the unilateral subcontracting of unit

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent STC, a corporation, engages in research and development of electric products at its facility in Pittsburgh, Pennsylvania. Respondent NSD, a corporation, engages in in research and development of nuclear products at its facility in Madison, Pennsylvania. Both Respondents admit the jurisdictional allegations of the consolidated complaint and thus I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

Both STC and NSD for many years recognized the Union as the bargaining representative of a unit of plant guards at their respective facilities. Such recognition has been embodied in a succession of collective-bargaining agreements between the parties. In the fall of 1994, the parties entered into new 4-year successor agreements. Thereafter, beginning in about January, Respondents, acting upon a parent corporate directive to cut nonrevenue producing cost centers, entered into negotiations with the Union with the purpose of cutting the cost of the bargaining units to a level competitive with the costs of using an independent subcontractor to perform the guard duties. The cost of the subcontractor was about half that of mandated by the new collective-bargaining agreements. The parties did not reach any agreements in this regard and in the spring of 1995. Respondents subcontracted out the unit work and permanently laid off its involved unit employees.

The consolidated complaint alleges that Respondents violated Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (the Act) when they laid off the bargaining units and subcontracted all bargaining unit work to an outside agency.3 Respondents contend that absent an express contractual provision prohibiting subcontracting, the Board and the courts have consistently found no violation of the Act where work has been taken from a bargaining unit and given to a contractor, including when the contracting our occurs during the course of the parties' agreement. In support it cites a number of Board and court decisions, most notably, Suburban Transit Corp., 276 NLRB 15 (1985); Griffin-Hope Co., 275 NLRB 487 (1985); and Milwaukee Spring Division, 268 NLRB 601 (1984) (Milwaukee Spring II). The General Counsel contends, correctly I believe, that the zipper clause contained in each involved collective-bargaining agreements, in the absence of a reopener clause and taking into account the fact that subcontracting was either a subject of negotiation or discussion during bargaining over these agreements, prevents Respondents from

work and the laying off of unit employees midterm of the collective-bargaining agreements. A charge does not have to specify the legal theory behind the alleged violation of the Act.

lawfully subcontracting out the work of the involved bargaining units and permanently laying off the unit employees.⁴

B. Relevant Facts and Conclusions Relating to the Actions at Issue of Respondent NSD

Facts regarding the negotiation of the last collectivebargaining agreement at NSD

Sally Mabray is employed as human resources manager for Westinghouse Electric Corporation, Nuclear Services division at the Madison (or Waltz Mill), Pennsylvania site. She has held this position since August 1, 1994. In this position, her duties are dealing with employee relations, promotion and transfer, reduction in force, enforcing the plant rules of conduct, negotiating labor agreements, and contract interpretation. She has held a similar position with another division of Westinghouse. In the fall of 1994, Mabray reported to Fred Gerardine, who was the site manager until he retired on or about December 1, 1994. After the retirement of Gerardine, Maybray reported to his replacement, Jack Bastin. The facility's manager of security is Russ Cline.

As pertinent, in October 1994, there were eight full-time employees and one casual employee at the facility providing security services. All but the casual employee were in a bargaining unit represented by the Union. The unit employees were guards J. C. Monroe, Doug Barchko, Mike Garofalo, Karen Markle, Christine Collier, Rich Stafford, Ron Conoway, and Ken Sherman. The casual employee was not a member of the baraining unit, but by past practice was utilized to replace unit guards while they were on vacation.

There had been a number of successive collective-bargaining agreements between the parties. The contract preceding the most recent one expired on November 11, 1994. Prior to its expiration, the parties conducted negotiations for a successor agreement on November 2, 3, and 9, 1994. Mabray acted as the chief spokesperson for the Respondent with Cline assisting. According to Mabray, prior to negotiations, she and Cline identified the issues management wanted to address in these negotiations. These issues were a drug screening process, and a procedure to supplement the guard force. Management wanted the ability to supplement the force because the remote location of the facility made it difficult to augment the guard force quickly in case of an emergency. Respondent also wanted to reduce overtime. Cline wanted to add additional casual employees to the one used to augment the guard force and to use the casual employees in ways other than to cover vacations. Cline also wanted Maybray to perform an area wage survey to see if the guards wages were in line with other employers' guards. She conducted such a survey and found that the average wage for the area and industry was about \$6 to \$8 per hour, as

³ Respondent STC took this action on about March 31, and Respondent NSD followed suit on about April 30.

⁴ It is respectfully suggested that the Board might consider revisiting *Milwaukee Spring II*, and its progeny in light of the facts of this case. Though such action is not in my opinion necessary to cure the egregious unfair labor practices of the Respondents herein under the facts of these cases for the reasons set forth in this decision, it may help promote industrial stability in future cases where an employer seeks to subcontract out the work of a bargaining unit during the term of a collective-bargaining agreement solely for the purpose of lowering labor costs. One wonders what response Respondents would have had if one of their contractual customers announced during the term of their contract that it had found a competitor who would provide the same service for less, and demanded that Respondents meet that price or their contract would be canceled.

opposed to the involved guards' wage rate of about \$22.50 per hour, including benefits. Because of this disparity, Cline wanted to make the wage rate paid under the new contract constant for its term, and any cost of living increased paid in a lump sum. He also wanted to address the current 3-percent inconvenience pay or shift differential that existed in the old contract

Maybray reviewed these issues with Gerardine on October 10, prior to negotiations. Gerardine agreed with the proposals that Maybray and Cline had formulated. Also discussed at this meeting was an upcoming December layoff that was necessitated by soft business conditions. Gerardine told her that the layoff would not affect the guard unit.

Subsequent to this meeting, Maybray again met with Cline to discuss negotiations. This meeting took place on October 25. They decided to discuss the facility's business condition with the Union and to give the Union a letter directed to all facility employees. This letter announced the impending layoffs.

At the negotiation session held on November 2, 1994, after giving the letter to the Union, she informed the Union that the guards would not be impacted by the layoff. She also shared with the Union the results of her wage survey. According to Maybray, as of the date of this negotiating session, she had not been informed of any impending decision to subcontract out the work of the guards. To the contrary, she testified that Gerardine was very satisfied with the existing security force.⁵ At this meeting the Company presented its contract proposals, two of which are pertinent to the issues in this case. They were denoted proposals "A" and "G." Proposal A was one affecting the recognition clause of the agreement. This change would add to the employees excluded from the bargaining unit, "guards employed through a temporary service, Staffing Services, etc." Staffing Services is the Westinghouse entity that employed the existing casual guard. This entity provides employees to augment various areas of the facility on a temporary basis because of the peak and valley nature of business. The Union adamantly opposed this change.

The Company by its proposal G proposed to add a new paragraph to the seniority section of the contract, as follows:

8. Temporary Workforce

If management deems that additional security coverage is needed due to absence of guard or guards or coverage for special events, a temporary security agency, Staffing Services, etc., will provide the necessary coverage to secure the facility and/or event.

The Union opposed this change.

The employer, by the change in the recognition clause wanted to reduce the amount of overtime paid by the use of casual guards on an unlimited basis. Though nothing was in the old agreement about the use of a casual guard, there was an existing past practice and understanding that one such casual could be used to cover vacations. The proposed addition to the seniority clause was to enable the Employer to provide security if it had a special event such as a company picnic. Unlike more urban locations, the Employer could not rely on the use of police in such circumstances. According to Maybray, this new provision would allow the Employer to call upon a temporary

service to cover special events. Both of these concerns were expressed to the Union. According to Maybray, with respect to the first of these proposals, the Union countered that the Company should hire more guards.

Joseph Monroe was a guard at NSD and was the chief steward for the Union. He participated in negotiations beginning with the meeting of November 2. With respect to company proposals A and G, Monroe testified that the Company expressed concern about cutting the overtime at the facility. Monroe said the union participants were concerned that if the Company got unlimited use of a agency guard force, the union jobs would be eliminated. According to Monroe this concern was expressed to management and the management participants assured them that it was not the Company's intention to replace the full-time guards and that they just wanted to cut overtime and be able to cover emergencies.

Steven Larkin, union Local president, was also a participant in negotiations. He testified similarly to Monroe. At the first meeting, when proposals A and G were presented, he remembered management saying they wanted to use an outside agency for special events, and emergency situations. He testified that at the first meeting Maybray said that it was not the Company's intention to replace the existing guards and it was the Company's intention to retain the eight guards presently employed. According to Larkin, this assurance was in response to his express concern that the wording of the Company's proposal would let the Company replace the existing force with a contract force. Larkin's notes of this meeting reflect that he responded to the Company's proposals by saying that they would train (contract guards) and then replace the bargaining unit.

There was a second meeting on November 3 in which the company again took the position that it needed unlimited access to a security guard force. The Union rejected this request and offered the use of an additional casual guard. The Company rejected this concept, with Cline stating that he needed unlimited use of an agency guard force in case of an emergency, a fire, or a construction project, or special events at the facility such as a picnic or a family day. The Union said, "no." According to Monroe and Larkin, the Union was again concerned about ultimately being replaced and Maybray said that the Company had no intention of eliminating any full-time Westinghouse guards and only wanted to cut overtime. According to Monroe, the Union's concerns were compounded by the Company's proposal to have the new contract's term be 1 year instead of the normal 4 years. The Union believed that the Company would use its proposals to get rid of the unit at the expiration of the 1-year contract.

Following the November 3 meeting, Larkin called Kerry Lacey, the Union's Director for Region 6, and informed him about what had transpired in negotiations. According to Lacey Larkin told him that everything was going smoothly, except for some language regarding the use of temporary employees that Respondent wanted included in the recognition clause of the new contract. Based on the language proposed, Lacey believed the Company wanted the ability to hire and utilize contract and temporary employees at will. Because of this proposal, Lacey decided to attend the next bargaining session.

The parties again met on November 9, with Cline and Maybray representing the Company, and Lacey, Larkin, and Monroe representing the Union. Maybray relied on her notes of the meeting to describe what took place. Maybray's notes of this session (Nov. 9), with respect to the proposal G state:

⁵ Cline testified that he had informed Gerardine at some point that the NSD Waltz Mill site was the only NSD facility that was using Union represented employee guards.

Russ (Cline) again went through his scenario of overtime costs and being between a rock and a hard place for special events, etc. Said for Russ to hire another casual guard at the lower hourly rate. Russ said he didn't need another full time guard. He need to have someone who would be trained and could come at the drop of a hat. NOTE: We have a real hangup on our Temporary Workforce Proposal which would be a tool to supplement our regular workforce for special events, etc., and also on the modification portion of the contract. Lacey (Union negotiator) said that we could let these go, and the contract would just go into force as it presently is—they are not interested in further discussing these issues. I told him that we have reached an impasse. He disagreed and became very upset that would even mention "impasse."

Maybray explained a further purpose of proposal G was to enable the Company to use more than one casual guard for not only vacations, but also in case of illness, holidays, and other occasions when the use of full-time guards would cause overtime to be incurred. About \$60,000 had been budgeted for overtime for the first year of the contract. In its proposal H, the Company proposed a 1-year contract to get away from pattern bargaining. The Company finally agreed to continue 4-year contracts.

Lacey testified that at this meeting, he told Cline that the Union was not interested in recognizing a subcontractor. According to Lacey, Cline responded by saying that the Company had no plans for replacing or contracting out positions. After a caucus, Lacey, Monroe, and Larkin formulated a proposal with respect to the use of more casual employees and subcontracted guards which would meet the specific stated needs of Respondent without going further. This proposal eliminated the Company's proposal to amend the recognition clause and substituted new language for that proposed in company proposal G. The Union's language reads:

8. Casual and Temporary Help

Two Casual Guards will be used to reduce the amount of overtime caused by vacation, illness, training or "knock out" day.

A Security Agency could be employed to cover construction projects, facility emergency or special events.

The Union formulated the counterproposal taking into account the Company's concern about overtime, which it covered with the less restricted use of two casual employees, and by the use of contract guards for special events and emergencies. The three union negotiators believed the language they proposed would protect them from being replaced. The Company did not immediately accept the proposal and the meeting ended with Lacey stating that if they could not come to agreement by the expiration of the old contract that the guards would continue to work under the terms of the old agreement for another year. Maybray said that the Company can give 60 days notice and break the contract, a position with which the Union disagreed.

On November 11 or 12, Lacey received a call from Cline in which Cline indicated he was interested in the Union's proposal with respect to temporary employees. According to Lacey, he was informed on November 14 that the Company accepted the Union's proposal and Lacey agreed that they had a contract that he could sell to the unit.

The Company asserted right to subcontract is based on the language of the collective-bargaining agreement's manage-

ment-rights clause. This is found in the agreement at page 6, under section 5, rights of the Company. This clause reads:

The Union recognizes that it is the responsibility of the Company and the plant Management to maintain the efficiency of the operation and agrees that the Company shall have the freedom of action necessary to discharge its responsibility for the successful operation of the Company. This responsibility includes, among other rights, the initiation of procedures by which its operations are to be conducted; the right to hire, maintain discipline including suspensions and discharge as required: promotion, transfer or layoff of employees: the selection of those with whom it will do business: the units of personnel required in its operation; determination of work schedules and shifts; assignment and direction of the work force; enforcement of rules and regulations; determination of protection and security measures required for the Waltz Mill Site. This section does not limit or modify the rights of the parties under any other provisions of the agreement.

Maybray testified that all Westinghouse union contracts have zipper clauses and in the NSD—union agreement it is contained in section 19, modification at page 48. She understands this clause to mean that anything discussed or negotiated during the bargaining process could not again be brought up, it would be zippered out for the life of the contract. This clause reads:

This agreement expresses the complete understanding of the parties in respect to all matters deemed by them to be applicable to the specified bargaining unit. Therefore, except as herein specifically provided, the Company and the Union, for the life of the agreement, each voluntarily and unqualifiedly waive the rights, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this agreement, or with respect to any subjects or matters not specifically referred to or covered by this agreement which were discussed during the negotiation of this agreement.

Neither the current collective-bargaining agreement nor any of its predecessors contain reopener language. Maybray testified that if the matter of subcontracting out the bargaining unit work was raised by the Union during negotiations and Respondent assured the Union that such was not the intention of Respondent, the zipper clause would preclude the Respondent from subcontracting out the unit work during the life of the contract.

Both Cline and Maybray testified that the issue of subcontracting did not come up in negotiations in a broader context than the limited use of a subcontractor for special events, construction, and emergencies. They deny that the Union ever raised a concern about the subcontractor being used to replace the unit guards. I do not credit these denials and do credit the testimony of the Union representatives that they did raise the concern that the unit guards might be replaced with contract guards and were assured that this was not the Company's intention. To a great extent the Company relies on Maybray's notes of the meetings to buttress its denials. However, I find these notes to be suspect. Maybray had two sets of notes purporting to describe the events of the first negotiating session, one dated October 31 and the other November 2. In her testimony, Maybray stated that the October 31 date was incorrect and that the meeting described in the notes took place on November 2. I

believe that the existence of the two sets of notes calls into serious question the manner and purpose of their preparation. Further, Maybray, in her testimony, never conceded that the union representatives raised a concern about being replaced by a subcontractor, yet Cline admitted in his testimony that after reviewing proposals A and G, the union representatives expressed concern about nonbargaining unit personnel doing bargaining unit work.6 I find it extremely difficult to believe that when confronted with proposals allowing unlimited use of casual employees and the use of a subcontracted guard force in the same discussion in which layoffs and the need to cut costs are also mentioned, the fear that replacement may be in the offing would not be raised by the Union. I find that such concerns were raised as the testimony of the union representatives indicates and that they were assured that such was not the intention of management. Such assurances would be consistent with the position of Gerardine, whom Maybray testified had indicated was totally satisfied with the existing guard complement and had no intention of replacing it.

2. Events occurring after the signing of the contract which led to the laying off of the NSD bargaining unit

In November, Respondent replaced Gerardine, who retired at the end of November with Jack Bastin. Shortly thereafter, the general services manager for the facility issued a directive requiring facility support supervisors, including the security operation, to achieve a \$3 million cost reduction in facilities support costs in 1995. Cline secured cost quotes for provision of the security function from Burns Security. This quote indicated that a \$277,000 savings could be made by outsourcing. On January 16, 1995, at the request of Respondent, the Union met to discuss the cost reduction matter. At this meeting representing the Respondent were Bastin, Cline's superior, Mark Sticke and Maybray. Representing the Union were Lacey and Monroe.

According to Maybray's testimony and her notes of this meeting, Bastin introduced himself and pointed out the need for the Respondent to cut costs and some measures that had been taken to do so. Maybray followed up saying much the same thing, and noted the Company was looking at outsourcing, and had outsourced several functions previously performed by employees. She noted that Cline had secured cost information from a subcontractor for guard services and would share that information with the union. She concluded by stating that "Our objective is not to have a contract guard force—our objective is to become cost effective."

Cline then showed the Union that Burns Security would provide the same service as provided by the guard employees for less than half the cost of the existing collective-bargaining agreement. Maybray testified that at the time of this meeting, the Respondent had no plans to subcontract, but was using the Burns information as a cost comparison. She asked the Union to come back to the Company and reach the same bottom line.

The Union voiced its objection and asked if Respondent was trying to reopen the contract. The Company reiterated its request that the Union meet again with its proposals on cutting costs

Later on January 16, Cline wrote Lacey setting another meeting where he requested the Union to demonstrate cost savings similar to those afforded by Burns. Cline again wrote Lacey on February 7, confirming the setting of two meetings, one on

February 20 and the other on February 23, and chiding Lacey for procrastinating in agreeing to meet.

Lacey responded in a letter in which he states, inter alia:

First, let us all acknowledge what has taken place prior to your letter. You indicated that Westinghouse feels a great need to realize some relief in regards to cost issues. Frankly, Mr. Cline, you had the complete and controllable opportunity to negotiate that relief in contract negotiations only a few weeks ago. It amazes me that after the union reported to you and your attorney, at negotiations, that if no agreement was reached by the contract deadline, the current contract would extend for another year. That extension would occurred without Westinghouse receiving any relief.

You and your attorney completely disregarded my interpretation. The Union was fully prepared to let the contract expire and not suffer any concessions. A few days later, however, you pleaded with me over the telephone not to let the contract expire, and indicated that the concessions the Union previously offered to the company be reinstituted—thereby settling the contract and allowing both the Union and Westinghouse to ink in good faith a four-year deal.

The Union, after careful consideration, agreed to give Westinghouse the relief that you sought at the bargaining table. It is through my respect for the corporation, and for the many Westinghouse labor relations staff colleagues I have dealt with, that I agree to meet and discuss the issues on Feb. 20, 1995. Let me make it clear that the Union has absolutely no obligation to bargain during the life of this agreement. However, we will listen to what you have to say and will react accordingly.

Maybray sent the Union a copy of a proposed Burns International Security Services contract on March 2, in response to an information request made by the Union.

On March 31, 1995, the Respondent sent the Union a letter that restated what had happened in the meetings between it and the Union. It then stated that the Union must meet the bid of Burns or the work would be subcontracted out. Specifically, the Company demanded that the Union accept an amendment to the contract in the salaries section which as most pertinent reduced the guards salaries to \$6 per hour effective April 10, 1995.

At a meeting held April 17, the Union rejected the Company's proposal. The parties exchanged other proposals, with the Company's last proposal still cutting the contract wages by a least half. The Union did not accept this proposal and in a letter from Maybray to the Union on April 24, the Respondent claimed that the parties were at impasse. She then notified the Union that effective April 30, the Respondent would outsource the guard work to Burns and the guards would be permanently replaced.

The Union responded to this letter by one dated April 27, in which it denied that impasse existed and offered to meet to further discuss the matter.

On April 27, Bastin posted a memo to all Waltz Mill employees notifying them that the guard unit would be replace. In this memo, he stated:

The decision to terminate the agreement was made due to an impasse in the bargaining process with the company offering wages that would bring guard salaries in line with those provided to guards at Westinghouse locations and other indus-

⁶ Even Maybray's purported notes dated November 2 state that the Union has a real "hang-up" about the use of temporary guards.

tries in Western Pennsylvania. The Company's decision is also in line with the corporatewide effort to reduce costs to become more competitive in the global marketplace.

On April 30, the Union filed a grievance over the decision to replace the guard unit. On May 15, the Respondent replied to the grievance stating:

Local management exercised its right in accordance with Section III of the local labor agreement to address inefficiencies within the operation. It was the desire of local management to develop a competitive financial operating budget that would enhance the ability of Waltz Mill to compete in the market-place, without resorting to subcontracting for these services negotiations with the United Plant Guard Worker of America to achieve this end were fruitless. Local management subcontracted for guard services in order to reduce operating costs, just as they have in other functions where costs were determined to be extremely high for similar services in the area and the competitive market place. Local management has met its obligations to the bargaining unit.

3. Conclusions with respect to the actions of Respondent NSD

I agree with the General Counsel's position and argument that the evidence supports the complaint allegations that Respondent NSD violated Section 8(a)(1) and (5) and Section 8(d) of the Act because the zipper clause in the collective-bargaining agreement and Section 8(d) of the Act prevent the Respondent from contracting the entire work of the bargaining unit during the term of the agreement without the Union's consent.

Generally, an employer may not unilaterally institute changes regarding mandatory subjects of bargaining such as wages, hours, and other terms and conditions of employment, such as subcontracting, before reaching a good-faith impasse in bargaining under Section 8(a)(5). Section 8(d) imposes an additional requirement that a party which seeks to modify a term or condition of employment "contained in" a current collective-bargaining agreement must obtain the consent of the other party before implementing the change. Therefore, an impasse in negotiations does not privilege a unilateral change in a contractual subject. If the employment conditions the employer seeks to change are not "contained in" the contract, however, the obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change. Milwaukee Spring Division, 268 NLRB 601 $(1984).^{8}$

The Board has held that a zipper clause in a collectivebargaining agreement may privilege either party to refuse to bargain during the term of the contract about subjects which are covered by the agreement. *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985). The parties may choose to bargain, but they may not be required to do so. If there is bargaining, no changes may be made in the contract without mutual agreement. *Mead Corp.*, 318 NLRB 201 (1995). Furthermore, neither party may unilaterally modify the contract midterm, even if the parties have bargained to impasse, unless the subject of the bargaining is covered by a reopener clause in the collective-bargaining agreement. *Speedrack, Inc.*, 293 NLRB 1054 (1989); *Hydrologics, Inc.*, 293 NLRB 1060 (1989).

The Board has also held that a zipper clause, by its terms, may prevent changes during the contract period in subjects which are not covered by the collective-bargaining agreement, including those not within the knowledge or contemplation of the parties. GTE Automatic Electric, 261 NLRB 1491 (1982). Such a zipper clause serves as a "shield" which a party may use against the other party's request for midterm bargaining but not a "sword" to accomplish unilateral changes in terms and conditions of employment. GTE, supra. The clause thus encourages industrial stability by preserving the status quo during the contract term. GTE, supra at 1491-1492. In this case, the 1994 contract is silent on the issue of permanent subcontracting. Therefore, the Respondent's unilateral subcontracting of the bargaining unit work did not violate Section 8(a)(5) unless the Respondent, by agreeing to the zipper clause, waived its right to bargain during the term of the contract over the subjects referred to in the zipper clause. Mead, supra. The test governing waivers contained in zipper clauses is the same as that for waivers contained in other contractual provisions—the waiver must be clear and unmistakable. Michigan Bell Telephone, 306 NLRB 281 (1992); Metropolitan Edison Co. v. NLRB, 460 U.S. 708 (1983).

I find the Respondent waived its right to make midterm changes in the staffing of the guards' work. Although the bargaining history behind the zipper clause is unclear, the operative language in the zipper clause is explicit. The clause provides that the parties "for the life of this Agreement . . . voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this agreement, or with respect to any subjects or matters not specifically referred to or covered by this agreement which were discussed during the negotiation of this Agreement." (Emphasis added.) The Union's expressed fear that the Respondent would replace the bargaining unit employees with guards from an outside agency, as a reason for objecting to the Respondent's temporary staffing proposal, and the Respondent's response that it did not intend to eliminate unit jobs, made staffing a subject that was discussed but not specifically referred to in the agreement. Therefore, I find that the zipper clause requires the Union's consent for changes in staffing and the use of subcontracts to decrease the unit guard staff.9

⁷ An employer's decision to subcontract unit work is a mandatory subject of bargaining when what is involved is the substitution of one group of workers for another to perform the same work, and not a change in directiorn or scope of the enterprise. *Acme Die Casting*, , 315 NLRB 202 fn. 1 (1994); *Torrington Industries*, 307 NLRB 809 (1992).

⁸ Reliance on this case and its progeny is misplaced as the factual situation in those cases are distinquishable from the instant case. In this case, the collective-bargaining agreements contain a a zipper clause; there was no such clause present in the collective-bargaining agreements in the cases relied upon by Respondent. The zipper clause is the key factor in precluding Respondent from raising the subject of subcontracting midterm in the contract. This issue of a zipper clause, absent the presence of a reopener clause in the agreements, preventing the parties from demanding wage concessions during the life of the contract or else subcontracting would be implemented, is not addressed in those cases.

⁹ Cf. *Jones Dairy Farm*, 295 NLRB 113 (1989), where the zipper clause stated that negotations on matters not covered by the agreement were to be deferred until the expiration of the agreement, and Michigan Bell Telephone, supra, where the Board upheld the unilateral implementation of a drug testing policy because the existing contract had no provision concerning or referring to drug testing, the zipper clause stated that the agreement was in final settlement of all demands and proposals made by either party during negotations and that the parties "intended thereby to finally conclude contract bargaining throughout its

In reaching this conclusion, the Respondent's claim that the subject of permanent subcontracting was never discussed is rejected. The Union's negotiating notes are direct evidence that it expressed its fear that the Respondent would replace the bargaining unit with workers from an outside agency, and these notes buttress the Union witnesses' testimony that assurances were given by Respondent that the guards would not be replaced. I do not credit Respondent's denial that such assurances were made. The Respondent's bargaining notes indicate that it assured the Union that it would not lay off unit employees. Such comments were reflective of the surrounding circumstances, such as the Respondent's well-publicized cost-cutting measures in other areas. I do credit the Union's representatives testimony that their fear of losing their jobs to a subcontractor was raised during negotiations and their fears were allayed by the Respondent's assurances that such was not Respondent's intent, further no one disputes that subcontracting was discussed and negotiated during the three sessions in November. The Union submitted a proposal allowing for limited subcontracting and the Respondent accepted it. Having agreed to a limitation on its right to subcontract, I am at a loss to understand how Respondent can now contend that subcontracting was not a matter of discussion or negotiation leading to the present collective-bargaining agreement. Assuming that Respondent did have the unfettered right to subcontract under the agreement's management-rights clause, then it has willfully limited that right under the negotiated language.

The Respondent also contends that it had reached an impasse in negotiations with the Union to justify its unilateral subcontracting. However, this argument is not a defense to the charge because parties to a contract need not bargain in mid-contract over matters not covered by a reopener clause. *Campo Slacks*, 266 NLRB 492, 497 (1983). Thus, impasse is irrelevant in this situation.

The Respondent also contends that if the Union was so concerned about the subcontracting of all unit work, it should have never entered into a contract without more restrictive language about subcontracting. The Board rejected a similar argument in Park-Ohio Industries, 257 NLRB 413, 414 (1981), where the employer argued that the union had waived its right to bargain over the transfer of unit work because it did not submit proposals to restrict the employer's freedom to transfer work. In the Board's view, this argument ignores the union's statutory right and represented the employer's attempt to shift its burden for obtaining contract language dealing with transfer of unit work to the union. The Board stated that it was not, however, incumbent on the union to obtain contract language; instead, it was incumbent on the employer, if it sought to limit or restrict the union's statutory right, to obtain the waiver. Similarly, in the instant case, I find that the Respondent's argument that the Union should have sought more restrictive language on subcontracting is without merit.

The Respondent also argues that it was privileged to subcontract the unit work under the management-rights clause which provides that it has the right to initiate procedures by which its operations are to be conducted efficiently. I find this argument also fails because the broadly worked management-rights clause says nothing about subcontracting. Cf. *Kohler Co.*, 273 NLRB 1580, 1582 fn. 1 (1985). Moreover, I do not believe the

duration," and the parties stipulated at trial that the drug policy or related subjects were not discussed during prior negotiations.

Respondent believed it possessed the right to subcontract unit work at the time of negotiation. If it did, its proposals to providing for a limited right to subcontract would have been unnecessary

I thus find that the Respondent's unilateral subcontracting of the work of the bargaining unit despite a contractual zipper clause requiring the Union's agreement to midterm changes violates Section 8(a)(1) and (5) and Section 8(d).

C. Relevant Facts and Conclusions Relating to the Actions at Issue of Respondent STC

1. Facts relating to the negotiation of the last contract at STC

Respondent STC is a corporation located in Churchill Borough, Pennsylvania and is engaged in research and development of electronics, electrical engineering, advanced material development, mechanical analysis, mechanical design, and software. At the beginning of 1995, there were approximately 800 employees working at the STC facility. Terry Coyle is STC's manager of employee relations and Larry McEvoy is STC's manager of asset protection.

The Union has represented the guards at STC for many years and the involved parties have entered into successive collective-bargaining agreements through 1994. In 1994, there were nine guards in the bargaining unit. On about September 29, 1994, the Union and Respondent STC met to negotiate a new collective-bargaining agreement. The meeting was held at the STC facility and lasted about 2 to 3 hours. Representing Respondent were Terry Coyle and Larry McEvoy. Coyle acted as spokesperson for STC. The Union was represented by Steve Larkin, vice president of the Local, and three employees, Brian Kuchar, Judy Jankowski, and Ted Wasko.

According to Kuchar, Coyle said that all of the business units are being looked at for downsizing and outsourcing as a cost cutting factor, but after consideration they decided to extend to the Union the same contract that they extended to other union employees at the facility. Coyle indicated that the Company had looked at outsourcing the guard jobs, but decided against it. The union representatives reviewed the proposed contract and agreed to sign it. There was also a casual guard used at the STC as well as at the Waltz Mill site. There is nothing in the contract that the Union signed that addresses subcontracting.

At the negotiations, according to Kuchar, the parties discussed two union proposals which the company accepted. One involved the use of a casual employee and the other an adjustment to the guards uniform allowance. The issue surrounding the casual employee was whether the causal employee or full-time employees would get overtime first. The Company agreed to first give overtime to the full-time guards.

Kuchar testified that the Union did not discuss outsourcing after Coyle's opening statement because Coyle had said he was pleased with the guard unit and was extending them the same contract as other union employees at the site enjoyed.

¹⁰ The nine employees are: Maryann Bichsel, Rich Blythe, Judy Jankowski, Brian Kuchar, Mark Lewis, Steve Lyle, John Petrovoy, Dennis Wasko, and Ted Wasko.

¹¹ Kuchar was asked a little later in his testimony if Coyle mention outsourcing and he responded that Coyle said the Respondent had looked into some kind of outside agency to replace (the union workers), but said they were please with the employees and had decided not to replace them and extend them a contract.

Steve Larkin was chief negotiator for the Union at this session and he testified that Coyle opened negotiations stating that after considering outsourcing that he was happy with services that (the Union) security officers provided, and was going to offer the Union the national package. This contract contained nothing about the matter of subcontracting and did not have a reopener clause.

According to Coyle, four items were discussed at this meeting. First was the company proposal that the guards receive the same wage and benefit package that was given to the other unionized employees at STC. Second was the Company's agreement to look into certain training issues raised by the Union. They discussed the union's request that regular guards be given priority in receiving overtime before overtime was given to casual guards. Last there was discussion of the Union's request that the uniform allowance be raised. According to Coyle, there was no discussion about subcontracting the guard work. The parties agreed on all issues and a contract was reached, which according to Coyle, contains nothing limiting management's right to subcontract bargaining unit work.

Insofar as there may be a conflict between the testimony of Kuchar and Larkin, on the one hand, and Coyle and McEvoy on the other, over what Coyle said at the outset of the negotiations, I credit the testimony of the two union representatives. Even Coyle admitted that he mentioned the Respondents financial condition and that it was looking at downsizing and outsourcing, but that it was extending to the Union an excellent offer under the circumstances.

2. Events occurring subsequent to the agreement which led to the layoff of the STC bargaining unit

Gilbert E. Koedel is employed at Westinghouse Science and Technology Center as the manager of human resources and environmental services for the facility. Inter alia, he testified that beginning in 1994, the Company embarked on a downsizing program which included planned reductions in force, designed to eliminate employees who did not do billable work, and those engaged in areas of technology in which the company no longer found customers. About 70 employees were laid off and about 40 to 45 employees elected voluntary retirement in 1994. This number included certain employees who did not fit the category of employees the Company wanted to leave and had a negative impact on its billings in the following months. Because it was obvious at the end of 1994 that billings would fall, Koedel had his employees look for ways to cut operating costs. He specifically asked McEvoy to look at subcontracting the security force.

McEvoy followed instructions and found that the subcontracting of the security service would result in significant cost savings. In January Coyle was informed by McEvoy that he had been instructed to cost out subcontracting and having done so, had been instructed to get Coyle's assistance in dealing with the guards regarding subcontracting.

According to Coyle, he and McEvoy met with the Local union officials on January 20 and told the Union members that there had been an adverse economic impact on STC and they needed to address the problem from a cost standpoint. He presented to the Union the cost of subcontracting the guard work to Burns and compared it with the existing cost of the employee guard force. He pointed out the \$200,000 difference in cost and stated that the Union need to alleviate this difference. Coyle stated that the company wanted to subcontract and cut costs.

Larkin was representing the Union at this meeting and suggested looking at other ways to cut costs.

Subsequent to this meeting Coyle wrote Larkin a letter which states:

At my request, we met on January 20, 1995 and discussed STC's critical overhead problems as they relate to the cost of providing STC site security. You were given the 1995 Total Compensation Costs for nine UPGWA guards which totaled in excess of \$400,000. I also provided you with cost data of outsourcing the security functions which would result in a \$200,000 savings. I indicated that I was open to any suggestions that could be negotiated to provide a comparable cost reduction utilizing UPGWA guards. We also discussed a 60 day period to conclude these negotiations.

On January 24, Rich Blythe (Steward) requested data from management regarding a breakdown of benefits and clarification for \$8000 savings plan cost and \$2000 for equipment. That data was provided to him on the 25th. Later that evening, Blythe met with me at his request. He indicated that based on some calculations the guards could reduce their cost by \$100,000, with the understanding that the contract increases would continue. He asked if this would be a sufficient savings to preserve their jobs. I stated that wouldn't solve the problem. Blythe requested that I provide the calculations for special early retirement for Maryann Bichsel and himself. I agreed to initiate the paperwork to provide that information. I made it clear that there could be no replacement for any guards that were permanently separated, including the use of casuals on a regular basis.

At the January 20th meeting, you agreed to contact me the following week. Since I had not heard from you I phoned you on the 30th and indicated management was available to meet. You later contacted me via the answering machine that you hadn't been able to set up anything with C. Lacey, UPGWA Director, Region 6. In conclusion, Larry McEvoy and I will be available to meet with you any time at your convenience to discuss ways and means of closing the \$200,000 gap.

In late February, the parties again met, but no agreement was reached. Another meeting was set for the following week. At this meeting the Union submitted some specific cost cutting proposals to the Company. One proposal was a price freeze for the life of the contract and the other was the extended use of casual guards. For its part, the Company proposed to cut pay to \$6 per hour with benefits or \$7 per hour with no benefits. The Union rejected this proposal as its members were currently making about \$14 per hour under the contract. The Company demanded they accept the offer or the guards would be replaced within 60 days. At this meeting Coyle presented cost comparisons between a contract force and the existing employees. Union Representative Lacey was present and responded that the comparison was nice, but they had a contract. Coyle said the difference was too large and the Company was looking at cost reductions, asking what the Union was going to do about it. The Union offered to waive any increases in the current contract and to add an additional 2 years to its term, with a wage reopener in the last 2 years. The Company took this proposal under consideration and they set another meeting for March 1.

At this meeting, the company rejected the Union's offer and proposed to pay the guards \$6 per hour with limited benefits or \$7 per hour with no benefits. The union rejected this proposal as it halved their contract wage. the Company then upped its proposal to \$6.15 an hour with some benefits or \$7 per hour without benefits. The Union rejected this offer and Coyle declared the parties at impasse and suggested effects bargaining. Lacey countered that he could not see how impasse could be reached with a contract in place. After some more discussion, the meeting ended. Lacy received a letter from Coyle dated March 7, in which he again stated the parties were at impasse and asked for another meeting.

Lacey sent a letter in response in which he rejected the claim of impasse and asked that dates be given for the purpose of negotiation of the potential decision to contract out the guard service to Burns International.

The parties met again on March 29 and the Union complained that information supplied it by the Company about the Burns Security did not address the labor cost needs of the Company. In response the Company resubmitted its last offer and stated it was their last offer. The Union rejected it again and the meeting ended.

By letter dated March 29, Coyle informed the Union that it was contracting with Burns and permanently replacing the employee guards. The Company did so 2 days later. The Union attempted to arbitrate the matter but the Company refused. During the entire time these discussions took place, the Company's position was that the matter was simply one of cost. The Respondent's negotiators were not under instructions to subcontract, but were under instructions to cut costs. Coyle testified that if the Union had accepted the company proposals, it is conceivable that they would still be there as the company was after cost reductions.

3. Conclusions with respect to Respondent STC's Actions

With regard to the situation at STC, THE General Counsel asserts and I agree that the legal argument and issues presented at STC are similar to those discussed with respect to NSD. I find that the evidence supports the complaint allegations that Respondent STC violated Sections 8(a)(1) and (5) and Section 8(d) of the Act because Section 8(d) and the zipper clause in the collective-bargaining agreement prohibit STC from subcontracting the guard work and permanently laying off the entire bargaining unit without the Union's consent during the time period that the collective-bargaining agreement was in effect, i.e., from September 29, 1994, until October 4, 1998.

The zipper clause in the contract is contained in section XIX, modification, which states:

SECTION XIX—MODIFICATION

This Agreement expresses the complete understanding of the parties in respect to all matters deemed by them to be applicable to the specified bargaining unit. Therefore, except as herein specifically provided, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subjects or matters which were discussed during the negotiation of this agreement.

The language in this zipper clause is explicit, and I find that it prevents Respondent STC from contracting out the guard work as it did in April 1995. Specifically, I find that the assur-

ances given by Terry Coyle in the September 1994 negotiation of the involved contract precludes Respondent STC from subcontracting the unit work. The language of the zipper clause precludes either party from the obligation of collective bargaining over any subject for matter "discussed during negotiation." Both Steve Larkin and Brian Kuchar, who were present at the negotiation, credibly testified that Terry Coyle, STC's spokesperson at the meeting, informed them that Respondent had considered downsizing and outsourcing, but instead had decided to offer the Union the 4 year agreement, which the Union accepted. While these statements were not lengthy, they made it unnecessary for any further discussion on the subject, as Coyle made it clear that the Respondent had looked into and rejected the concept of subcontracting the unit work. As Brian Kuchar testified, "I felt that we had a secure job for the next 4 years and that they agreed to go with us over the placement of an outside agency." Given Coyle's statements, it would have been pointless for the Union to further discuss or negotiate the matter of subcontracting.

I believe that Coyle's assurances regarding outsourcing and downsizing at the September 1994 negotiation placed that subject with the restrictions of the zipper clause. Since outsourcing, or subcontracting, was part of the discussions at the negotiation, the Union was not obligated to engage in further bargaining on the subject. *Suffolk Child Development Center*, supra. STC could not unilaterally make the decision to subcontract; it could only do so if it obtained the Union's consent. *Mead Corp.*, supra.

For the reasons set forth above, I find that Respondent has violated Section 8(a)(1) and (5) and Section 8(d) as alleged in the complaint.

CONCLUSIONS OF LAW

- 1. The Respondents, Westinghouse Electric Corporation, Science and Technology Center and Westinghouse Electric Corporation, Energy Systems, Nuclear Services Division, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. International Union, United Plant Guard Workers of America (UPGWA) and its Local 502 is a labor organization within the meaning of Section 2(5) of the Act.
- 3. At all material times, by virtue of Section 9(a) of the Act, the Union has been and is the exclusive collective-bargaining representative of Respondents' employees in the following described units:
- (a) NSD—All plant guards at the Westinghouse Electric Corporation, Energy Systems, Nuclear Services Division, Waltz Mill Site, Sewickley Township, Westmoreland County, Pennsylvania, excluding all other employees, supervisors as defined in the Act.
- (b) STC—All guards of the Employer at its Science & Technology Center located in Churchill Borough, Pennsylvania; excluding all other employees, office clerical employees, professional employees and supervisors as defined in the Act.
- 4. By subcontracting the work of unit employees and permanently laying off its unit employees on March 31, 1995, Respondent STC has engaged in conduct in violation of Section 8(a)(1) and (5) and 8(d) of the Act.
- 5. By subcontracting the work of unit employees and permanently laying off its unit employees on April 30, 1995, Respondent NSD has engaged in conduct in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

6. The unfair labor practices committed by Respondents are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It is recommended that Respondent STC be ordered to offer its unit employees immediate reinstatement to their former positions and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of their unlawful layoff on March 31, 1995, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 293 NLRB 1173 (1987).

It is recommended that Respondent NSD be ordered to offer its unit employees immediate reinstatement to their former positions and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of their unlawful layoff on April 30, 1995, to date of proper offer of reinstatement in the manner set forth above.

It is recommended that both Respondents NSD and STC be ordered to adhere to and comply with the respective collective-bargaining agreements covering unit employees at their respective sites, and to bargain in good faith and obtain the consent of the Union before making any changes in the terms and conditions of employment of its employees as set forth in the respective collective-bargaining agreements.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended 12

ORDER

The Respondents, Westinghouse Electric Corporation, Science and Technology Center, Pittsburgh, Pennsylvania, and Westinghouse Electric Corporation, Energy Systems, Nuclear Services Division, Waltz Mill Site, Madison, Pennsylvania, their officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- a. Without first obtaining the consent of the Union, subcontracting to an outside agency the work of their unit employees and permanently laying off unit employees during the term of a collective-bargaining agreement covering the unit employees.
- b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act:
- (a) Respondent STC shall, within 14 days from the date of this Order, offer Maryann Bichsel, Rich Blythe, Judy Jankowski, Brian Kuchar, Mark Lewis, Steve Lyle, John Petrovoy, Dennis Wasko, and Ted Wasko full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

- (b) Respondent NSD, shall within 14 days from the date of this Order, offer J.C. Monroe, Doug Batchko, Mike Garofalo, Karen Markle, Christine Collier, Rich Stafford, Ron Conoway, and Ken Sherman full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- (c) Respondents STC and NSD shall make whole those employees named above for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.
- (d) Respondents STC and NSD shall adhere to and comply with the respective collective-bargaining agreements covering unit employees at their respective sites, and bargain in good faith and obtain the consent of the Union before making any changes in the terms and conditions of employment of its employees as set forth in the respective collective-bargaining agreements.
- (e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (f) Within 14 days after service by the Region, post at their facilities in Pittsburgh, Waltz Mill, and Madison, Pennsylvania, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents, or either of them, have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 6, 1995, in the case of Respondent STC and since May 3, 1995, in the case of Respondent NSD.
- (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to what steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT without first obtaining the consent of the Union, subcontract to an outside agency the work of our unit employees and permanently lay off unit employees during the term of a collective-bargaining agreement covering the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Maryann Bichsel, Rich Blythe, Judy Jankowski, Brian Kuchar, Mark Lewis, Steve Lyle, John Petrovoy, Dennis Wasko, and Ted Wasko full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the date of the Board's Order, offer J. C. Monroe, Doug Batchko, Mike Garofalo, Karen Markle, Christine Collier, Rich Stafford, Ron Conoway, and Ken Sherman full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or priveleges previously enjoyed.

WE WILL make whole those employees named above for any loss of earnings and other benefits suffered as a result of the discrimination against them, less net interim earnings plus interest.

WE WILL adhere to and comply with the respective collectivebargaining agreements covering unit employees at their respective sites, and bargain in good faith and obtain the consent of the Union before making any changes in the terms and conditions of employment of our employees as set forth in the respective collective-bargaining agreements.

WESTINGHOUSE ELECTRIC CORPORATION SCIENCE & TECHNOLOGY CENTER AND NUCLEAR SERVICES DIVISION